

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

GLOBAL HARVEST FOODS, LTD., a  
Washington corporation, and GLOBAL  
HARVEST OF COLORADO LLC, a Nevada  
limited liability company,

Plaintiffs,

v.

DES MOINES FEED COMPANY, an Iowa  
corporation,

Defendant.

NO. \_\_\_\_\_

COMPLAINT FOR TRADEMARK  
INFRINGEMENT AND UNFAIR  
COMPETITION

Plaintiffs Global Harvest Foods, Ltd. and Global Harvest of Colorado LLC (collectively “Global Harvest” or the “Plaintiffs”) by and through their attorneys, bring this Complaint against Defendant Des Moines Feed Company (“Des Moines” or the “Defendant”) and allege as follows:

**I. INTRODUCTION**

1. This is an action for trademark infringement, false advertising activities, false designation of origin, false description and representation of visual designs, unfair or deceptive acts or practices, common law unfair competition, imposition of a constructive trust, and an accounting of Defendant’s ill-gotten gains.

2. On information and belief, Defendant has used, and is using, the AUBDUBON BRAND mark for its wild bird seed in spite of the United States Patent and Trademark’s Office’s (“USPTO”) rejection of the Defendant’s application for use of the mark as confusingly similar to the AUDUBON Marks owned by Global Harvest.

4. On information and belief, Defendant's false advertising was a systematic part of its business operations.

5. Global Harvest Foods, Ltd., is a Washington corporation with its principal place of business in Tukwila, Washington. Global Harvest develops, markets, and distributes AUDUBON®, AUDUBON PARK®, and AUDUBON FRIENDS® (collectively, the “AUBUBON Marks”) brands of bird food, wildlife food, and feeders (collectively, “Plaintiffs’ Goods”).

7. On information and belief, Defendant is a corporation organized under the laws of the State of Iowa, with a principal place of business in Des Moines, Iowa.

8. This Court has personal jurisdiction over Defendant because it purposefully directed its activities at Washington, and Global Harvest's claims arise from those activities. On information and belief, Defendant has conducted business activities in, and directed to, Washington, is the primary participant in tortious acts in, and directed to, Washington, and has purposely availed itself of the opportunity to conduct commercial activities in this forum.

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1 jurisdiction under 28 U.S.C. § 1332, as the parties are citizens of different states and the  
2 amount in controversy exceeds \$75,000.

3 10. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(b) because  
4 Defendant is subject to the court's personal jurisdiction with respect to this action.

#### 5 **IV. FACTUAL BACKGROUND**

##### 6 **A. Global Harvest and the AUDUBON Marks.**

7 11. Global Harvest first commenced sales of bird food under the AUDUBON  
8 PARK mark in May of 1958, and registered it on December 1, 1959, for "wild bird seed  
9 mixture" in International Class 031, receiving U.S. Trademark Registration No. 0689191.  
10 Global Harvest of Colorado is the registrant and owner of record for U.S. Trademark  
11 Registration No. 0689191, for which combined declarations of use and incontestability under  
12 Sections 8 and 15 of the Trademark Act were filed on December 18, 1964. U.S. Trademark  
13 No. 0689191 is valid and incontestable and was renewed under Sections 8 and 9 of the  
14 Trademark Act on December 1, 1979, October 30, 1999, and November 14, 2009.

15 12. Global Harvest of Colorado is the registrant and owner of record for U.S.  
16 Trademark Registration No. 1478920 for the trademark AUDUBON. U.S. Trademark  
17 Registration No. 1478920 was registered on March 1, 1988, for "wild bird food and sunflower  
18 seeds, bird food" in International Class 031, with a first use in commerce in February of 1980  
19 and with combined declarations of use and incontestability under Sections 8 and 15 of the  
20 Trademark Act being filed on January 28, 1994. U.S. Trademark Registration No. 1478920 is  
21 valid and incontestable and was renewed under Sections 8 and 9 of the Trademark Act on  
22 February 13, 2008.

23 13. Global Harvest of Colorado is the registrant and owner of record for U.S.  
24 Trademark Registration No. 1890080 for the trademark AUDUBON PARK & Design. U.S.  
25 Trademark Registration No. 1890080 was registered on April 18, 1995, for "wild bird food  
26 and sunflower seeds birdfood" in International Class 031, with a first use in commerce in

1 December of 1989 and with declarations of use and incontestability under Sections 8 and 15  
2 of the Trademark Act being filed April 20, 2000. U.S. Trademark Registration No. 1890080  
3 is valid and incontestable and was renewed under Sections 8 and 9 of the Trademark Act on  
4 December 11, 2014.

5 14. Global Harvest of Colorado LLC is the registrant and owner of U.S.  
6 Trademark Registration No. 2230812, for the trademark AUDUBON FRIENDS & Design.  
7 U. S. Trademark Registration No. 2230812 was registered on March 9, 1999, for “wild bird  
8 feed and sunflower seeds” in International Class 031, with a first use in commerce on  
9 August 15, 1996, and with declarations of use and incontestability under Sections 8 and 15 of  
10 the Trademark Act being filed on March 1, 2005. U.S. Trademark Registration No. 2230812  
11 is valid and incontestable and was renewed under Sections 8 and 9 of the Trademark Act on  
12 March 13, 2009.

13 15. Global Harvest of Colorado LLC is the registrant and owner of U.S.  
14 Trademark Registration No. 2290950 for the trademark AUDUBON PARK & Design. U.S.  
15 Trademark Registration No. 2290950 was registered November 9, 1999, for “wild bird feed  
16 and sunflower seeds” in International Class 031, with a first use in commerce on August 15,  
17 1995, and with declarations of use and incontestability under Sections 8 and 15 of the  
18 Trademark Act being filed November 14, 2005. U.S. Trademark Registration No. 2290950 is  
19 valid and incontestable and was renewed under Sections 8 and 9 of the Trademark Act  
20 October 19, 2009.

21 16. Examples of the AUDUBON Marks as they currently appear in commerce can  
22 be seen below:  
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True and correct copies of the Certificates of Registration are attached hereto as Exhibit A.

17. Global Harvest acquired common law trademark rights to the AUDUBON Marks through their use of the marks in United States interstate commerce. The AUDUBON Marks appear in the advertising and marketing materials of Plaintiffs' online and brick and mortar retailers, on the product packaging for Plaintiffs' Goods, and on Plaintiffs' [ghfoods.com](http://ghfoods.com) website. The Plaintiffs' AUDUBON Marks have been featured in magazines with a national circulation, such as Better Homes and Gardens, and local newspapers with national significance, such as the Chicago Tribune, among other, specialty publications.

1           18. Global Harvest distributes its products through more than 100 retail business  
2 partners throughout the United States, including hardware channels, such as Tractor Supply;  
3 mass merchants, such as Fred Meyer; clubs, such as Costco; pet channels, such as Purina; and  
4 grocery stores, such as Safeway and Kroger.

5           19. To create and maintain goodwill among its customers and to protect its  
6 valuable trademarks, Plaintiffs have taken substantial steps to ensure that Plaintiffs' Goods are  
7 of the highest quality and in 2013 led the industry as an early adopter of the FDA's Food  
8 Safety Modernization Act (FSMA).

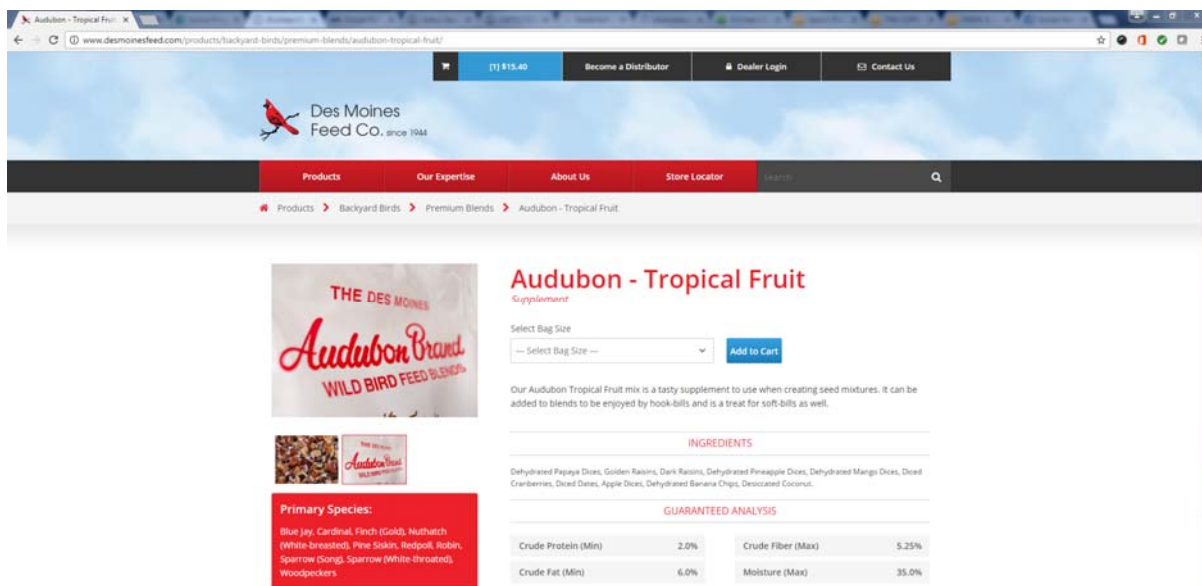
9           20. Plaintiffs have not authorized the transfer, assignment, or license of any of its  
10 intellectual property rights to Defendant, including without limitation, the AUDUBON Marks.

11 **B. Defendant's Infringing Use.**

12           21. Upon information and belief, Defendant is a maker and retailer of wild bird,  
13 pigeon, cage bird, and wildlife food mixes (collectively, "Defendant's Goods").

14           22. Upon information and belief, Defendant has sold, and continues to sell,  
15 Defendant's Goods under the AUDUBON and AUDUBON BRAND trademarks.

16           23. Upon information and belief, Defendant uses the AUDUBON and AUDUBON  
17 BRAND trademarks to advertise and promote Defendant's Goods. A current example of this  
18 trademark use, taken from Defendant's [desmoinesfeed.com](http://desmoinesfeed.com) website, can be seen below:  
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24. On or about December 2, 2016, Plaintiffs discovered Defendant's AUDUBON and AUDUBON BRAND bird food for sale at a Plaintiffs' franchisee retail location. Plaintiffs had no prior knowledge of Defendant's use of the AUDUBON and AUDUBON BRAND trademarks by Defendant.

25. On or about January 13, 2017, Plaintiffs sent a cease and desist letter to Defendant.

26. Upon information and belief, despite Plaintiffs' request that Defendant cease all use of "Audubon" in connection with bird and wildlife food, Defendant continues to advertise, market, and sell the AUDUBON and AUDUBON BRAND products on its website and throughout various third party retail channels.

27. Upon information and belief, Defendant has had actual knowledge of Plaintiffs' AUDUBON Marks since at least as early as 1997, when Defendant's federal trademark application for THE AUDUBON BRAND WILD BIRD FEED BLENDS DES MOINES ATTRACTION AUDUBON BRAND FEED & Design, U.S. Ser. No. 75281066, was refused registration by the United States Patent and Trademark Office.

1           28. Defendant's AUDUBON and AUDUBON BRAND trademarks are  
2 confusingly similar to Plaintiffs' AUDUBON Marks. Defendant's AUDUBON and  
3 AUDUBON BRAND trademarks are being used on related, if not identical, goods.

4           29. Upon information and belief, the goods offered, promoted, advertised, and sold  
5 by Defendant under the AUDUBON and AUDUBON BRAND trademarks are in the same  
6 channels of trade and to the same customers as Plaintiffs' AUDUBON Marks, and as such,  
7 are competitive goods.

8           30. Upon information and belief, Defendant's use of the confusingly similar  
9 AUDUBON and AUDUBON BRAND trademarks is likely to cause confusion on the part of  
10 the consuming public.

11           31. Due to Defendant's willful infringement and refusal to cease and desist,  
12 Plaintiffs are left with no choice but to file this lawsuit seeking injunctive relief and damages  
13 that have resulted from Defendant's acts of trademark infringement and unfair competition.

14                           **V. FIRST CLAIM FOR RELIEF**  
15                           **Trademark Infringement – 15 U.S.C. § 1114**

16           32. Plaintiffs repeat and reallege each and every allegation in paragraphs 1 to 31  
17 above, as if fully set forth herein.

18           33. Defendant's activities constitute infringement of Plaintiffs' federally registered  
19 trademarks as listed above.

20           34. Plaintiffs advertise, market, present, and sell its goods under the AUDUBON  
21 Marks, and use these trademarks to distinguish Plaintiffs' goods from the goods of others in  
22 the same field or related fields.

23           35. Because of Plaintiffs' long, continuous, and exclusive use of the AUDUBON  
24 Marks, the Marks have come to mean, and are understood by consumers, to signify goods of  
25 Plaintiffs.

1           36. The infringing goods that Defendant has and is continuing to sell are likely to  
2 cause confusion, mistake, or deception as to their source, origin, or authenticity.

3           37. Defendant had knowledge of Plaintiffs' prior use and registration of Plaintiffs'  
4 AUDUBON marks for wild bird food, but has nevertheless used and continues to use  
5 Plaintiffs' trademarks without authorization and in disregard of Plaintiffs' rights.

6           38. At a minimum, Defendant acted with willful blindness to, or in reckless  
7 disregard of, Plaintiffs' registered marks.

8           39. As a result of Defendant's wrongful conduct, Plaintiffs are entitled to recover  
9 their actual damages, Defendant's profits attributable to the infringement, and treble damages  
10 and attorneys' fees pursuant to 15 U.S.C. § 1117 (a) and (b). Alternatively, Plaintiffs are  
11 entitled to statutory damages under 15 U.S.C. § 1117 (c). Plaintiffs are further entitled to  
12 injunctive relief and an order compelling the impounding of all infringing materials.  
13 Plaintiffs have no adequate remedy at law for Defendant's wrongful conduct because, among  
14 other things: (a) Plaintiffs' trademarks are unique and valuable property that have no readily  
15 determinable market value; (b) Defendant's infringement constitutes harm to Plaintiffs'  
16 reputation and goodwill such that Plaintiffs could not be made whole by any monetary award;  
17 (c) if Defendant's wrongful conduct is allowed to continue, the public is likely to become  
18 further confused, mistaken, or deceived as to the source, origin, or authenticity of the  
19 infringing materials; and (d) Defendant's wrongful conduct, and the resulting harm to  
20 Plaintiffs, is continuing.

21                           **VI. SECOND CLAIM FOR RELIEF**

22                           **Lanham Act Unfair Competition, False Endorsement and**  
23                           **False Designation of Origin**  
24                           **15 U.S.C. § 1125(a) et seq.**

25           40. Plaintiffs repeat and reallege each and every allegation in paragraphs 1 to 39  
26 above, as if fully set forth herein.

1           41.     Plaintiffs advertise, market, present, and sell their goods under the AUDUBON  
2 Marks, and use these trademarks to distinguish Plaintiffs' goods from the goods of others in  
3 the same field or related fields.

4           42.     Because of Plaintiffs' long, continuous, and exclusive use of the AUDUBON  
5 Marks, the Marks have come to mean, and are understood by consumers, to signify goods of  
6 Plaintiffs.

7           43.     Upon information and belief, Defendant's wrongful conduct includes the use  
8 of trademarks which are the same, or nearly the same, as Plaintiffs' AUDUBON Marks.

9           44.     Upon information and belief, Defendant's wrongful conduct misleads and  
10 confuses customers and the public as to their origin and authenticity of the goods advertised,  
11 marketed, presented, sold, and distributed in connection with Plaintiffs' AUDUBON Marks,  
12 and wrongfully trades upon Plaintiffs' goodwill and business reputation. Defendant's conduct  
13 constitutes (a) false designation of origin, (b) false or misleading description of fact, and (c)  
14 false or misleading representation of fact, all in violation of Section 43(a) of the Lanham Act,  
15 15 U.S.C. § 1125(a) et seq.

16           45.     As a direct result of Defendant's violation of 15 U.S.C. §§ 1125(a) et seq.,  
17 Plaintiffs have sustained, and will continue to sustain, substantial injury, loss and damages,  
18 including damage to their business reputation and goodwill.

19           46.     As a direct result of Defendant's wrongful conduct, Plaintiffs are entitled to  
20 recover their actual damages, Defendant's profits, treble damages and attorneys' fees pursuant  
21 to 15 U.S.C. § 1117.

22           47.     Plaintiffs are also entitled to injunctive relief enjoining Defendant's wrongful  
23 conduct pursuant to 15 U.S.C. § 1125(a). Plaintiffs have no adequate remedy at law for  
24 Defendant's wrongful conduct because, among other things, Defendant's infringement causes  
25 harm to Plaintiffs such that Plaintiffs could not be made whole by any monetary award. If  
26 Defendant's wrongful conduct is allowed to continue, the public is likely to become further

1 confused, mistaken, or deceived as to the source, origin, or authenticity of the infringing  
2 materials; and Defendant's wrongful conduct, and the resulting damage to Plaintiffs, is  
3 continuing.

4 **VII. THIRD CAUSE OF ACTION**  
5 **Washington State Unfair Competition**  
6 **RCW §§ 19.86.010**

7 48. Plaintiffs repeat and reallege each and every allegation in paragraphs 1 to 47  
8 above, as if fully set forth herein.

9 49. Defendant has misled and confused its customers and the public as to the  
10 origin and authenticity of the goods and services it advertised – including promising or  
11 implying through advertisements and marketing materials that Defendant sells the  
12 AUDUBON brand bird seed.

13 50. Defendant's conduct constitutes unfair and deceptive acts and practices in the  
14 conduct of trade or commerce. Defendant's conduct has the capacity to deceive a substantial  
15 portion of the public to whom that conduct is directed because, on information and belief,  
16 Defendant's customers believe they are purchasing Plaintiffs' goods.

17 51. Defendant's acts and practices are injurious to the public interest because  
18 Defendant, in the course of its business, continuously advertised to and solicited the general  
19 public throughout the United States to purchase wild bird seed from Defendant by expressly  
20 or implicitly promising, among other things, that its products were genuine AUDUBON  
21 goods.

22 52. As a result of Defendant's wrongful conduct, Plaintiffs were injured in their  
23 business or property, including without limitation (a) reputational injury and loss of business  
24 goodwill, and (b) displaced sales of genuine AUDUBON goods, as a result of the sale of  
25 unlicensed wild bird seed.  
26

53. In addition, because Defendant's unfair trade practice is willful, the award of actual damages and profits should be trebled pursuant to RCW 19.86.090 and should include appropriate attorneys' fees and costs.

#### **VIII. FOURTH CAUSE OF ACTION** **Accounting**

54. Plaintiffs are entitled, pursuant to 17 U.S.C. § 504 and 15 U.S.C. § 1117, to recover any and all profits of Defendant that are attributable to the acts of infringement.

55. The amount of money due from Defendant to Plaintiffs is unknown to Plaintiffs and cannot be ascertained without a detailed accounting by Defendant of the precise number of units of infringing goods advertised, marketed, sold, or distributed by Defendant.

#### **IX. FIFTH CAUSE OF ACTION** **Common Law Unfair Competition**

56. Global Harvest advertises, markets, distributes, and licenses its wild bird seed and related products under the trademarks described above, and uses these trademarks to distinguish Global Harvest's bird seed and related products from the wild bird seed or products of others in the same field or related fields.

57. Because of Global Harvest's long, continuous, and exclusive use of these trademarks, they have come to mean, and are understood by customers, end users, and the public to signify wild bird seed and related products from Global Harvest.

58. Global Harvest has also designed distinctive and aesthetically pleasing displays, logos, icons, and graphic images (collectively, "Global Harvest visual designs") for its wild bird seed and related products.

59. On information and belief, Defendant's wrongful conduct includes passing off infringing materials as genuine Global Harvest wild bird seed or related products approved or authorized by Global Harvest.

1           60. In distributing unauthorized wild bird seed, Defendant has used Global  
2 Harvest's name or marks in a way that is likely to deceive, and indeed has deceived, the  
3 public.

4           61. As a direct and proximate result of Defendant's unfair competition, Global  
5 Harvest was injured in its business or property, including without limitation, (a) reputational  
6 injury and loss of business goodwill, and (b) displaced sales of Plaintiffs' goods as a result of  
7 the sale of unauthentic and unauthorized wild bird seed, in an amount to be proved at trial.

8                           **X. SIXTH CAUSE OF ACTION**  
9                           **Imposition of a Constructive Trust**

10          62. Defendant's conduct constitutes deceptive and wrongful conduct in the nature  
11 of passing off the infringing materials as genuine Global Harvest wild bird seed or related  
12 products approved or authorized by Global Harvest.

13          63. By virtue of Defendant's wrongful conduct, Defendant has illegally received  
14 money and profits that rightfully belong to Plaintiffs.

15          64. On information and belief, Defendant holds the illegally received money and  
16 profits in the form of bank accounts, real property, or personal property that can be located  
17 and traced. All such money and profits, in whatever form, are held by Defendant as a  
18 constructive trustee for Plaintiffs.

19                           **XI. PRAYER FOR RELIEF**

20          WHEREFORE, Plaintiffs pray for judgment against the Defendant and for the  
21 following relief:

- 22          1. That the Court enter a judgment against Defendant finding that it has:
- 23               a. willfully infringed Plaintiffs' trademark rights;
- 24               b. engaged in acts of unfair competition; and
- 25               c. otherwise injured the business reputation and business of Plaintiffs by
- 26               the acts and conduct set forth in this Complaint.

2. That the Court issue permanent injunctive relief against Defendant, enjoining Defendant and all persons acting in concert with Defendant from using the AUDUBON Marks, or any other trademarks that are similar to the AUDUBON Marks, which are in any way causing actual confusion, likelihood of confusion, deception, or mistake as to the source, nature, or quality of Defendant's goods.

3. For any and all actual damages, trebled, that were sustained by Plaintiffs, in an amount to be determined at trial;

4. For all of Defendant's profits wrongfully derived from its intentional and willful infringement of Plaintiffs' trademark rights;

5. For exemplary and punitive damages to deter any future willful infringement as the Court finds appropriate;

6. For costs of suit herein;

7. For reasonable attorneys' fees; and

8. For any other relief as the Court deems proper.

RESPECTFULLY SUBMITTED this 26th day of September, 2017.

/s/ Emilia L. Sweeney

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/s/ Ashley K. Long

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